

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rule on Motions Concerning)	
Mail Preparation Changes)	Docket No. RM2016-6

**COMMENTS OF VALPAK DIRECT MARKETING SYSTEMS, INC. AND
THE VALPAK FRANCHISE ASSOCIATION, INC. ON PROPOSED RULE
ON MOTIONS CONCERNING MAIL PREPARATION CHANGES**
(September 2, 2016)

Introduction

The Commission issued Order No. 3048 on January 22, 2016, inviting public comment on a proposed rule on motions concerning Postal Service mail preparation rule changes that require compliance with the market dominant price cap rules. The Commission's Notice Reinstating Rulemaking (July 27, 2016) set the deadline for comments as September 2, 2016. *See* 81 *Fed. Reg.* 51145 (Aug. 3, 2016). Valpak Direct Marketing Systems, Inc. and the Valpak Franchise Association, Inc. (hereinafter "Valpak") submit the following comments on the proposed rule.

Comments

Order No. 3048 states that the primary **purpose** of the proposed rule "is to ensure that the Postal Service properly accounts for the rate effects of mail preparation changes under § 3010.23(d)(2)" — part of the Commission's price cap rules. Furthermore, the Commission states that its **intention** for the proposed rule is "to standardize the procedure and timeframe by which interested parties must file a motion with the Commission." Order No. 3048 at 1.

Although the proposed rule may achieve the Commission's stated **intent**, it has the opposite effect in achieving its primary **purpose**.

The Commission's Stated Rationale. The proposed rule would apply whenever the Postal Service proposes a change to mail preparation rules that has an undisclosed price change effect, but where the Postal Service has not indicated that it will file a corresponding notice of a price adjustment. Most importantly, the proposed rule imposes strict limits on the filing of such a motion by requiring that it "must be filed at least¹ 30 days after a party has actual or constructive notice of the implementation date of the change."

The Order acknowledges that "the Commission's general motion rules would provide an avenue for motions concerning mail preparation changes, [but] the **rules do not set a timeframe** by which motions must be made...." *Id.* at 2-3 (emphasis added).

The two apparent effects of the proposed rule, intended or not, are: (1) to limit the opportunity for mailers to raise a price cap effect to 30 days after notice, and possibly (2) to foreclose any other opportunity or method of raising such an issue in another forum or at a later time. Both of these effects create problems.

30-Window Is Too Narrow. First, the 30-day window provided by the proposed rule is unfairly narrow. Large mailers are complex enterprises, complying with many mail preparation rules, not always monitoring every pronouncement from the Postal Service. Thirty days is entirely inadequate for each mailer and any consultants and counsel to reach a complete understanding of the operational aspects of a rule change, the economic impact of a rule

¹ This language appears to be inconsistent with Order No. 3048's description of how the proposed rule would function.

change, and the legal impact of a rule change, and then to prepare and file an appropriate motion challenging the Postal Service's failure to announce its intention to recognize rate effects of that rule change.

The Postal Service often will share general information about the direction in which it is heading, but the effect of complex rule changes may not be known until they are fully fleshed out. In other situations, the Postal Service may be silent — or ambiguous — as to whether it will be accounted for under the cap. In either situation, the mailer should not be foreclosed from bringing a challenge when the complete story is known.

Unintended Effects — Precluding Mailers Raising Issue Elsewhere. The Commission did not discuss that, in addition to filing a motion, interested persons currently have other avenues to request that the Commission require Postal Service compliance to the price cap rules, including filing comments in pricing dockets and annual compliance reviews, as well as filing a complaint. One can anticipate the Postal Service filing a motion to strike mailer comments in all of these proceedings if they are outside of the 30-day period allowed under the proposed rule. Moreover, the Postal Service could erroneously argue that the proposed rule established the exclusive remedy by which mailers may object to the failure of the Postal Service to recognize price effects of mail preparation rule changes. The Commission should make clear that this was not the intent of this rule.

Unintended Effects — Protective Motions. Indeed, one unintended effect of the proposed rule is that mailers would be forced to file protective motions challenging all proposed mail preparation rules within 30 days of receiving any information about possible future rule changes. The Postal Service sometimes shares information about such changes far

in advance of implementation, and under this rule, once the mailer had actual (or constructive) notice, it must file a protective motion.

Docket No. R20130-10 Illustrates the Problem. In the example provided by the Commission, in Docket No. R2013-10, commenters raised the issue of the Postal Service's plan to require Full-Service IMb for mailers to remain eligible for automation prices after the actual price case was filed. The Postal Service's notice of market-dominant price adjustment was filed on September 26, 2013, five months after the Postal Service's *Federal Register* notice and four months after the Commission's proposed rule would have terminated the right of mailers to file their objections (May 20, 2013). *See* Order No. 3048 at 4. Had the new rule been in effect, mailer objections could not have been filed in Docket No. R2013-10. This example could not more clearly demonstrate how unfair and arbitrary the Commission's proposed rule is and how its primary effect is to significantly limit the ability of mailers to raise issues related to the price cap.

July 2016 MTAC Announcements Illustrate the Problem. The Postal Service recently announced plans to implement a number of structural changes to market dominant pricing contemporaneously with a January 2017 price change, including announcements made at the July 2016 meeting of the Mailers' Technical Advisory Committee.² Several of these proposed changes may have price cap effects, but the Postal Service was not clear that it would account for all of them in price cap calculations. Under the proposed rule, the deadline for mailers to file a motion concerning price cap compliance would have already expired before

² *See, e.g.*, proposals under consideration at <http://pe.usps.com/PriceChange/Index>.

today, September 2, 2016. There is no good reason why mailers cannot be afforded sufficient time to make certain that the Postal Service price cap calculation is correct before it must file a motion.³

Conclusion

Compliance with the price cap is a statutory obligation of the Postal Service and the Commission, and mailer objections based on violation of the price cap should not be subject to waiver by a procedural rule. For the foregoing reasons, Valpak urges the Commission to withdraw the proposed rule.

Respectfully submitted,

/s/ William J. Olson

William J. Olson
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc. and
The Valpak Franchise Association, Inc.

³ Insofar as there already exists a rule that governs motions in Price Adjustment dockets, the proposed rule could be said to constitute a change in agency position, and the Commission has not provided “a reasoned explanation [which] is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” FCC v. Fox Television Stations, 556 U.S. 502, 515-16 (2009). The Supreme Court recently reaffirmed its rule that “An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.” Encino Motorcars, LLC v. Navarro, 579 U.S. ____ (2016), slip op. at 9-10.